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(9)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

YAMAHA MOTOR CORPORATION, U.S.A. and
YAMAHA MOTOR COMPANY, LTD.,
Petitioners,

v.

LUCIEN B. CALHOUN and ROBIN L. CALHOUN,
Individually and as Administrators of the
Estate of Natalie K. Calhoun, Deceased,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the judicially created federal maritime wrongful death remedy preempts state wrongful death and survival remedies for torts occurring within a State's territorial waters.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interest: whether the judicially created federal admiralty remedy preempts state wrongful death and survival remedies for those torts occurring within a State's territorial waters.

Long before federal admiralty law recognized a remedy for wrongful death, the States exercised their police powers to protect their citizens by creating remedies for tortious conduct causing death. The Court has long affirmed the States' authority to provide remedies for maritime torts causing death. Moreover, the States bear "primary responsibility for recreational boating safety law enforcement, education and assistance." U.S. Department of Transportation, U.S. Coast Guard Commandant Instruction M16750.5C (Dec. 22, 1988) (promulgating The Boating Safety Manual (State Edition)). Every State has enacted statutes regulating recreational vessel safety and either established marine police forces or authorized other personnel to enforce these laws. *See* Appendix. States are also taking the initiative in responding to the increase in serious jet ski accidents. *See id.*[1]

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.[2]

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[1] *See also* Alexandra Alger & William G. Flanagan, *Snowmobiles of the Sea*, Forbes, Aug. 28, 1995, at 304, 305; Jon Nordheimer, *It Mimics A Mosquito, But Inflicts Worse Injury*, N.Y. Times, Aug. 27, 1995, at 31, 36; Amy Argetsinger, *Deaths Rise as More People Ride the Waves*, Washington Post, Aug. 27, 1995, at A1, A6-A7.

[2] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The Court has long recognized the States' authority to provide remedies for tortious conduct which causes death within their borders even when such conduct occurs within the admiralty jurisdiction. The Court has repeatedly held that state created wrongful death remedies do not violate the essential uniformity of the maritime law.

The Court's creation of a wrongful death remedy under the federal maritime law does not render the application of state remedies in maritime tort actions anomalous. Indeed, as the Court has recognized, such remedies are saved to suitors under § 9 of the Judiciary Act of 1789. Thus, reviving *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), to hold that federal common law rules preempt state wrongful death remedies would mark an undue intrusion into the States' authority to protect the safety and lives of their citizens. It is also unwarranted because state laws regulating maritime affairs remain subject to the restraints of the dormant commerce and due process clauses as well as preemption through either legislative action or the treaty power.

2. Holding that the federal common law admiralty remedy preempts state remedies would be especially unwarranted because Congress has expressly left to the States the subject matter of the remedy for the wrongful death of a non-seaman in territorial waters. While Congress has enacted a remedy for wrongful death arising out of maritime torts applicable to non-seamen (which preempts state remedies), by its express terms the remedy applies only to deaths occurring on the high seas. *See* 46 App. U.S.C. § 761. Congress also expressly preserved state remedies for torts occurring within a State's territorial waters. *Id.* § 767. As the Court has observed, "the [Death on the High Seas] Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225 (1986). And Congress preserved state remedies aware that they "may actually have been more generous than the remedy provided by [DOHSA]."

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398 (1970). If there is a national interest in having a uniform rule limiting maritime wrongful death recoveries, Congress should make that choice.

3. Nor does *Moragne*'s creation of a wrongful death remedy in order to vindicate the uniquely federal duty of seaworthiness support the preemption of state wrongful death remedies. This federal rule (which imposes an absolute duty on vessel owners to provide seamen and formerly other maritime employees with a seaworthy workplace) "ha[d] become the principal vehicle for recovery by seamen for injury or death." 398 U.S. at 399. The *Moragne* Court was thus properly concerned with ensuring the vindication of this exclusively federal maritime duty. But where, as here, the duties which have been breached violate state law as well, the States retain a substantial interest in enforcing them. Consistent with the Court's recognition that the States may exercise substantial regulatory authority over maritime affairs concurrent with that of the Federal Government, the Court should make clear that *Moragne* does not preempt a state remedy when the underlying duty is cognizable under state law.

4. Holding that the *Moragne* remedy preempts state wrongful death remedies within the State's territorial waters would lead to the perverse result that those harmed by the same tortious conduct will have different recoveries depending solely upon whether the tort occurred on navigable waters (and within the admiralty jurisdiction), or on the State's inland waters. Indeed, because of the reach of the admiralty jurisdiction, adopting petitioners' rule will prompt much wasteful litigation over whether seemingly inland bodies of water are within it.

Moreover, unlike Congress, federal courts do not have the power to create a common law applicable to all torts. Thus, while petitioners assert that the preemption of state remedies is necessary to avoid anomalous treatment of claimants, their regime will impose anomalous results on a far wider scale. The Court should therefore reaffirm the

States' authority to remedy all tortious waterborne deaths occurring within their borders.

ARGUMENT

THE GENERAL MARITIME LAW'S WRONGFUL DEATH REMEDY DOES NOT PREEMPT THE APPLICATION OF STATE WRONGFUL DEATH REMEDIES TO A TORT WHICH OCCURS WITHIN THE STATE'S TERRITORIAL WATERS AND VIOLATES STATE LAW DUTIES

I. THE MARITIME LAW HAS LONG APPLIED STATE WRONGFUL DEATH AND SURVIVAL REMEDIES

This Court has long recognized that the "[m]aritime law is not a monistic system" which always requires the application of uniform federal rules. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374 (1959). Indeed, because "the maritime law [is] not a complete and perfect system . . . in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration." *Just v. Chambers*, 312 U.S. 383, 390 (1941). As Justice Holmes observed, "The maritime law is not a corpus juris —it is a very limited body of customs and ordinances of the sea." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting); *see also The City of Norwalk*, 55 F. 98, 107 (S.D.N.Y. 1893) (cited with approval in *Just*, 312 U.S. at 389), *aff'd in part and rev'd in part*, 61 F. 364 (2d Cir. 1894).

Our constitutional system is founded on the recognition that the States possess sovereign authority over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45, at 296 (Isaac Kramnick ed. 1987). Thus, notwithstanding that the Constitution "empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' and to continue the development of this law within constitutional limits," *Romero*,

358 U.S. at 360-61 (citation omitted), the Court has exercised this power mindful that "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Id.* at 374. As the Court further noted in *Romero*:

> Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.

Id. at 373 (footnote omitted). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 115 S.Ct. 1043, 1054 (1995); *The City of Norwalk*, 55 F. at 106.

State remedies for wrongful death and the survival of actions are among those state created legal rights which admiralty courts have long enforced.[3] *See Just*, 312 U.S.

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[3] In *Romero*, the Court described the extent to which federal admiralty law has looked to state law in adjudicating disputes:

> State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

358 U.S. at 373-74 (footnotes omitted). *See also The City of Norwalk*, 55 F. at 106-07.

at 391-92; *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). Whether the admiralty enforced these remedies because they were viewed as "maritime [but] local in character," *id.* at 242, or as "general legislation [enacted] by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health," *The City of Norwalk*, 55 F. at 106, one thing is clear: their application to those maritime torts occurring within a State's territorial waters traditionally was not viewed as "work[ing] material prejudice to the characteristic features of the general maritime law or interfer[ing] with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216.

This was so even though until 1970 there was no remedy for wrongful death under the federal general maritime law as adjudged by this Court. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *The Harrisburg*, 119 U.S. 199 (1886). Indeed, even before *The Harrisburg*, the Court had held that state created wrongful death and survival remedies were enforceable in maritime tort actions as remedies which were saved to suitors under the Judiciary Act of 1789, 1 Stat. 76-77. *See Sherlock v. Alling*, 93 U.S. 99 (1876); *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1872).[4]

In *Steamboat Co. v. Chase*, the Court upheld the application of Rhode Island's wrongful death and survival statutes in a suit based on a collision between a sailboat and steamer. In so holding, the Court rejected the defendant's contentions that the State could not "give a remedy to a suitor for a consequential injury growing out of a marine tort, when no remedy for such injury exists

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[4] As explained at pp. 20-23 *infra*, the Court's creation in *Moragne* of a wrongful death remedy to vindicate the uniquely federal duty of seaworthiness does not support preemption of state wrongful death remedies where tortious conduct violates both maritime and state law duties. For a discussion of the type of conditions which violate the seaworthiness duty, *see* Grant Gilmore & Charles L. Black, Jr., *The Law Of Admiralty* 383-404 (2d ed. 1975).

in the admiralty." *Id.* at 524. There, defendants argued that the purpose of the constitutional grant of admiralty jurisdiction to the federal courts "was to create a maritime court for the purpose of administering the universal law of the seas" and that "there is an obvious propriety in excluding the courts of common law from adjudicating upon subjects which are, from their nature, of admiralty cognizance." *Id.* The Court dismissed these arguments, strikingly similar to those of Yamaha, reasoning that the common law was competent to provide the remedy and the right to the remedy was secured under the savings to suitors clause. *Id.* at 533 (citing 1 Stat. 76, § 9).

In *Sherlock*, the Court upheld the application of Indiana's wrongful death and survival statute to a suit arising out of the death of a steamer passenger. There, defendants objected on the ground that "the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress." *Id.* at 101-02. The Court rejected this uniformity argument, stating:

> with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. . . . [I]t may be said, generally, that the legislation of a State, not directed against any commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit. In our judgment, the statute of Indiana falls under this class.

Id. at 104. The Court emphasized that "[u]ntil Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the

persons injured, we are of the opinion that the statute of Indiana applies. . . ." *Id.*

Thus, by the time of *The Harrisburg*, the Court had already upheld the application of state created wrongful death remedies in maritime tort actions.[5] And while *The Harrisburg* held that the general maritime law did not recognize an action for wrongful death (its *ratio decidendi* being that no such action lay at common law, *see* 119 U.S. at 213), it also recognized that the maritime law borrowed from land based law and where the latter recognized the cause of action, the admiralty would adopt that

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[5] The United States asserts that until *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), "[t]he federal courts . . . continued to struggle with that portion of *The Harrisburg*'s legacy that was undisturbed by Congress—the absence of a federal maritime cause of action for wrongful death of non-seamen occurring in the territorial waters." Br. U.S. *Am. Cur.* 10.

While both *Steamboat Co.* and *Sherlock* were brought in state court under the savings to suitors clause, both cases involved maritime torts subject to federal maritime law, with the Court rejecting arguments that the application of state wrongful death remedies interfered with the essential characteristics of admiralty law. *See supra* 6-8. Thereafter, numerous lower federal admiralty courts adopted state wrongful death statutes in suits brought both *in personam* and *in rem*. *See, e.g., The City of Norwalk*, 55 F. at 98; *The James Berwind*, 44 F. 693 (S.D.N.Y.), *rev'd on other grounds*, 49 F. 956 (2d Cir. 1891); *The St. Nicholas*, 49 F. 671 (S.D.Ga. 1891); *The Oregon*, 45 F. 62 (D. Or. 1891), *rev'd on other grounds*, 158 U.S. 186 (1895); *The E.B. Ward, Jr.*, 17 F. 456 (C.C.E.D. La. 1883); *The Sylvan Glen*, 9 F. 335 (E.D.N.Y. 1881); *The Garland*, 5 F. 924 (E.D. Mich. 1881); *Holmes v. Oregon & C. Ry. Co.*, 5 F. 75 (D. Or. 1880); *In re Long Island Transp. Co.*, 5 F. 599 (S.D.N.Y. 1881).

Whatever doubt remained as to the propriety of applying state wrongful death remedies in federal admiralty court was put to rest in *The Corsair*, 145 U.S. 335, 347-48 (1892), some thirty years before *Western Fuel*. While *The Corsair* upheld the dismissal of a wrongful death suit brought *in rem* because the state law had not created a lien against the "offending thing" (which was a jurisdictional prerequisite to an *in rem* proceeding), it also made clear that "[i]f [the state law] merely gives a right of action *in personam* for a cause of action of a maritime nature, the District Court may administer the law by proceedings *in personam*." *Id.* at 347.

rule. As the Court stated, "no country . . . had adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched." 119 U.S. at 213. As the *City of Norwalk* explained:

> . . . since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive,—the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty.

55 F. at 108.

Accordingly, the unavailability of a wrongful death remedy was never viewed as being one of the "characteristic features of the general maritime law" which was to be shielded from state laws which "work[ed] material prejudice" to it or which "interfere[d] with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216. To the contrary, in this context, the maritime law embraced whatever law was established by the controlling jurisdiction notwithstanding any disuniformity which might arise.

Thus, in *La Bourgogne*, 210 U.S. 95, 138-39 (1908), this Court held that wrongful death claims could be brought against a French vessel for a tort occurring on the high seas because French law recognized the right to recover for wrongful death; contemporaneously the courts of Holland, Germany, and Scotland enforced wrongful death remedies in maritime tort actions. Robert M. Hughes, *Handbook of Admiralty Law* § 110, at 224-26 (2d ed. 1920) (cited in *Just*, 312 U.S. at 388 n.8). Yet at the same time the admiralty courts of England, the leading seafaring nation of the period, did not recognize the existence of a wrongful death remedy under the general maritime law. *See The Harrisburg*, 119 U.S. at 205;

The Vera Cruz, 10 App. Cas. 59 (H.L. 1884); *see also* Hughes, § 111, at 227.

It is thus no surprise that *Jensen*, the very decision which is the source of petitioners' entreaty that the essential uniformity of maritime law requires the preemption of state wrongful death remedies, *see* Pet. Br. 39-43, itself recognized that these remedies were among those state laws which could modify the general maritime law. *See Jensen*, 244 U.S. at 216.[6] As this Court stated in *Western Fuel*:

> where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

257 U.S. at 242. *See also Just*, 312 U.S. at 392 ("Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permit-

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[6] The United States and the MLA invoke *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), in support of their contention that the Constitution contemplates "a system of [maritime] law coextensive with, and operating uniformly in, the whole country." *See* Br. U.S. 13, 14; Br. *Am. Cur.* MLA 6. Yet *The Lottawanna* upheld state authority to create liens on vessels in favor of those furnishing repairs and supplies, which were enforceable in admiralty, notwithstanding its concern that it would "be far more satisfactory to have a uniform law regulating such liens." 88 U.S. (21 Wall.) at 581. The Court instead left it to Congress to determine whether the interest in uniformity required a single Federal rule. *Id.* at 581-82; *see also id.* at 576-77.

ting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate."). And in *Romero* the Court observed: "State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes." 358 U.S. at 373.

As the foregoing demonstrates, the general maritime law has never viewed the subject matter of wrongful death remedies as being one of its "characteristic features" or the provision of state remedies as "interfer[ing] with the proper harmony and uniformity of that law in its international or interstate" relations. *Jensen*, 244 U.S. at 216. Rather, throughout the world, admiralty law traditionally has looked to shoreside law, whether statutory or common law, to determine if a claimant in a maritime tort action was entitled to recover for wrongful death, a practice which this Court also has long endorsed through the application of state wrongful death remedies to suits in admiralty.

To argue then, as petitioners do, that the essential uniformity of admiralty law requires that the judicially created *Moragne* remedy preempt continued application of state wrongful death statutes to suits arising out of incidents occurring in a State's territorial waters, is to ignore that the legal consequence for causing a tortious death has never been "a matter of global concern requiring uniformity under general maritime law." *American Dredging Co. v. Miller*, 114 S.Ct. 981, 990 (1994). Indeed, given that the fundamental premise underlying the Constitution's grant of admiralty jurisdiction to the federal courts was the admiralty law's international character, *see, e.g.*, The Federalist No. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987)[7], petitioners' argu-

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[7] It is generally recognized that the framers' decision to vest the admiralty and maritime jurisdiction in the federal courts was prompted by the understanding of the international character of the maritime law. *See, e.g.*, Preble Stolz, *Pleasure Boating and*

ment amounts to nothing more than a plea for the return of federal common lawmaking in the manner of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), albeit under the guise of *Southern Pacific v. Jensen*. *See* Pet. Br. 31 ("the remedy is to be determined under a uniform system of federal common law, regardless of who is killed or where the accident takes place"). Putting aside that *Jensen* acknowledged the validity of the admiralty's applying the very type of state statutes which petitioners now challenge, *see* 244 U.S. at 216, reviving its doctrine to invalidate state wrongful death and survival remedies is unwarranted for numerous reasons.

First, denying suitors their state wrongful death and survival remedies violates the savings to suitors clause which, as the Court held in *Steamboat Co. v. Chase*, pre-

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Admiralty: Erie at Sea, 51 Cal. L. Rev. 661, 669-70 (1963); David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Supreme Ct. Rev. 158, 163-64; *Cf. Luke v. Lyde*, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617-18 (K.B. 1759) (opinion of Lord Mansfield, C.J.) (characterizing the maritime law as "not the law of a particular country, but the general law of nations"). *See also* The Federalist No. 80, at 447 (Alexander Hamilton) (Isaac Kramnick ed., 1987); 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (2d ed. 1907) (Statement of James Madison).

Whether or not one accepts the view that the framers intended for the admiralty and maritime jurisdiction to encompass the model of private litigation which it has evolved into, *see* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117 (1993) (arguing that framers' concern was to provide a federal forum competent to adjudicate matters of sovereign interest such as prize cases, crimes committed on the high seas, and revenue cases, not private disputes which were considered unimportant), it is clear that the principal concern of the jurisdictional grant was uniform enforcement of those principles of admiralty which were of international character. But as Justice Holmes observed, "The maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea." *Jensen*, 244 U.S. at 220 (dissenting). Where a particular subject matter is not part of this "very limited body" of law and custom, state law governing that subject matter should be evaluated under traditional dormant commerce clause and preemption principles.

serves these remedies notwithstanding that they did not exist at the time of the Judiciary Act's enactment. *See* 83 U.S. (16 Wall.) at 533. Indeed, given that the Court in *Moragne* exercised its common law powers to create a wrongful death remedy reasoning that such remedies are now part of the fabric of the common law, *see* 398 U.S. at 391-93, it is difficult to understand why state wrongful death and survival remedies are no longer saved to suitors under the Judiciary Act of 1789, 1 Stat. 76, § 9, 28 U.S.C. § 1333(1), as the Court held in *Steamboat Co. v. Chase*. To maintain then, as the United States does, that the admiralty's application of state wrongful death remedies is merely a "historical anomaly" for which "there is no longer any justification," Br. U.S. 6, is to ignore that the savings clause expressly preserves them.[8] *See Romero*, 358 U.S. at 361-62.

Extending *Jensen* to the realm of state wrongful death remedies would also mark an undue intrusion into the sovereignty of the States to exercise their police power for the protection of the safety and lives of their citizens. The Court has observed, however, that *Jensen* and its progeny, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), "have been limited by subsequent holdings of this court" and "marked isolated instances" of admiralty common law rules preempting state law. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973).

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[8] *Jensen*, of course, struck down a state workers' compensation scheme on the ground that it was a remedy "of a character wholly unknown to the common law." 244 U.S. at 218. The Court in *Steamboat Co. v. Chase*, however, had earlier rejected this argument with respect to state wrongful death statutes notwithstanding that these remedies did not exist at the time of enactment of the Judiciary Act, 1 Stat. 76. *See* 83 U.S. (16 Wall.) 533. *Moragne*'s conclusion that recovery for wrongful death "has become itself a part of our law," 398 U.S. at 390-91; *see also id.* at 392-93, reaffirms the conclusion that state remedies for wrongful death are saved to suitors. It would be incongruous to hold that wrongful death remedies are part of the common law for purposes of creating such a remedy, *see id.* at 390-93, but are not part of the common law's remedies for purposes of the savings clause.

Moreover, reviving *Jensen* is unwarranted given that under our Constitution, state laws regulating maritime affairs remain subject both to the restraints of the dormant commerce and due process clauses as well as preemption through either legislative action or the treaty power. *See American Dredging*, 114 S.Ct. at 991-92 (Stevens, J., concurring in part and concurring in the judgment). As the Court stated in *The Lottawanna*, "we must always remember that the court cannot make the [maritime] law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department." 88 U.S. (21 Wall.) at 576-77; *see also id.* at 581-82; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation."). And with respect to the specific question of whether the judicially created *Moragne* remedy preempts state wrongful death remedies, invoking such vague notions as the need for uniformity is all the more untoward because Congress has expressly left to the States the subject matter of the remedy for the wrongful death of a non-seaman (other than longshoremen and harbor workers, *see* 33 U.S.C. §§ 901-950) in the territorial waters.

II. CONGRESS HAS EXPRESSLY LEFT TO THE STATES THE SUBJECT MATTER OF THE REMEDY FOR THE WRONGFUL DEATH OF A NON-SEAMAN OCCURRING IN TERRITORIAL WATERS

In 1920, Congress legislatively altered the maritime law with the enactment of two statutes which created wrongful death remedies applicable in many maritime tort actions. *See Miles*, 498 U.S. at 23-24. The Death on the High Seas Act (DOHSA) provides a remedy to the "wife, husband, parent, child or dependent relative" for the death of any person "caused by wrongful act, neglect or default occurring on the high seas beyond a marine

league from the shore of any State." 46 App. U.S.C. §§ 761, 762. The Jones Act, 46 App. U.S.C. § 688, incorporated the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to provide a wrongful death remedy "in favor of the personal representative of a seaman killed in the course of employment," *Miles*, 498 U.S. at 23-24, which applies even when the tort occurred within a State's territorial waters. *See Lindgren v. United States*, 281 U.S. 38, 44-47 (1930).

When applicable, DOHSA and the Jones Act supersede a State's wrongful death remedies. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 230-32 (1986) (DOHSA); *Lindgren*, 281 U.S. at 44-47. Respondents' decedent, however, was not a seaman subject to the Jones Act. And with respect to non-seamen, the Court has acknowledged that "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." *Romero*, 358 U.S. at 374 n.42 (citation omitted); *see also Moragne*, 398 U.S. at 399-400.

Indeed, in enacting the DOHSA, Congress made clear in two separate provisions its purpose of preserving state wrongful death remedies for those torts which occurred within territorial waters. Thus, Section 1, which created DOHSA's right of action, expressly limits it to "the death of a person . . . occurring on the high seas beyond a marine league from the shore of any State . . . ." 46 App. U.S.C. § 761. Section 1's "reach . . . was explicitly limited to actions arising from accidents on the high seas, so as to 'prevent the Act from abrogating by its own force, the state remedies then available in state waters.'" *Offshore Logistics*, 477 U.S. at 224 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621-22 (1978)) (citation omitted). As the Senate Report explains, "[t]he right is made exclusive for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States." S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919) (quoting letter of Judge Harrington Putnam); *see also*

H.R. Rep. No. 674, 66th Cong., 2d Sess. 3 (1920) (same).

DOHSA contains an additional provision, Section 7, 46 App. U.S.C. § 767, entitled "Exceptions from operation of chapter," which provides further evidence of Congress' purpose of preserving state wrongful death remedies for those torts occurring within a State's territorial waters. This section, which the Court has characterized as "a product of perhaps overabundant caution," *Offshore Logistics*, 477 U.S. at 223, expressly preserves state remedies:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State . . . .

46 App. U.S.C. § 767.

As the Court has observed, Section 7 was enacted in response to *Jensen* and the "fear that absent a saving clause specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts." *Offshore Logistics*, 477 U.S. at 224. Only three years earlier *Jensen* had held that a state workers' compensation scheme was "of a character wholly unknown to the common law" and thus was not "saved to suitors" under the Judiciary Act of 1789, § 9, 1 Stat. 76. *See* 244 U.S. at 218. Because wrongful death statutes were also unknown to the common law, *see The Harrisburg*, 119 U.S. at 213-14, Section 7 was enacted to "ensure[] that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court." *Offshore Logistics*, 477 U.S. at 225.

The United States, in contrast to its position in *Moragne*,[9] now asserts that Section 7 has little signifi-

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[9] In *Moragne*, the United States argued that Section 7:

cance. In the United States' view, Section 7 "serves merely 'as a *jurisdictional* savings clause.'" *See* Br. U.S. *Am. Cur.* 20 (quoting 477 U.S. at 221). In other words, it preserves the availability of a state forum but does not save the state remedy from preemption.

The Court, however, has continued to recognize that Section 7 does more than preserve a state forum for a DOHSA claim. Rather, it also reflects a congressional purpose to preserve state wrongful death remedies for those torts which occur in territorial waters. *See Offshore Logistics*, 477 U.S. at 224-25. Thus, when Congress considered the issue of whether the federal maritime law should preempt state wrongful death remedies, it limited the scope of that preemption to those torts occurring on the high seas and expressly authorized the continuation of the practice of applying state wrongful death remedies to those torts occurring on territorial waters. *Cf. Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 317-21 (1955) (rejecting application of admiralty law to insurance dispute noting that Congress had expressly authorized state insurance regulation); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852) (upholding state law imposing liability for failing to use pilot noting that Congress had expressly authorized state regulation).

Minimizing the significance of the DOHSA as an expression of Congress' purpose to preserve state remedies

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> manifests a legislative purpose that State laws governing wrongful death should continue to be available, according to their terms, where no remedy is provided by the Death on the High Seas Act. But neither the language of the Act, nor its legislative history, gives any indication that this preservation of State law was intended by Congress to preclude the federal courts from vindicating the peculiarly federal, maritime interest at issue in this case—namely, the right of a person acting as a seaman to be supplied a seaworthy vessel on which to work.
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> Br. U.S. *Am. Cur.* 18, *Moragne*, 398 U.S. 375 (No. 175 O.T. 1969) (citation omitted).

in territorial waters, the United States contends that "Section 7 does not suggest that state remedies applicable to deaths in territorial waters would continue to apply notwithstanding the creation of the general federal maritime remedy for wrongful death in *Moragne*." Br. U.S. *Am. Cur.* 20. This argument is flawed in multiple respects.

First, it attributes to Congress an extraordinary degree of prescience. It ignores that Congress legislated against a jurisprudential background that included this Court's decisions upholding the application of state wrongful death and survival remedies to maritime torts, *see Sherlock*, 93 U.S. at 104; *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) at 533, as well as the values of *stare decisis*. *See supra*, pp. 6-8.

It likewise ignores that the impetus for the creation of the *Moragne* remedy—the emergence of the strict liability doctrine of unseaworthiness—had not been held to impose on a vessel owner an absolute duty, independent of negligence, until this Court's decision in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), and *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), a quarter century after the DOHSA's enactment. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548-49 (1960). In enacting the DOHSA, Congress simply had no reason to anticipate the Court's creation of a federal maritime remedy for wrongful death fifty years in the future. Indeed, *Moragne* took a far more restrained approach than that which the United States argues for here, reasoning only that the DOHSA did not intend to preserve state remedial schemes which denied recovery for the evolving and uniquely federal maritime duty of seaworthiness. *See* 398 U.S. 397-400; *see also* pp. 20-23 *infra*.

Moreover, if Congress had viewed the existing state wrongful death remedies as being either inadequate in their coverage or as providing excessive redress, it could have made the DOHSA remedy applicable to those torts occurring on territorial waters and preempted state law. Its failure to do so is especially significant given that the

same Congress enacted not only the DOHSA, thus extending a wrongful death remedy to the high seas where state remedies were frequently inadequate, *see Offshore Logistics*, 477 U.S. at 213-14, but also the Jones Act, which applies in territorial waters and limits recovery to pecuniary loss preempting more generous state remedies. As the Court observed in *Moragne*, the state remedies which the DOHSA left undisturbed in territorial waters "not only were familiar but also may actually have been more generous than the remedy provided by the new Act." 398 U.S. at 398. If, as petitioners and their *amici* argue, there is a national interest in having a uniform federal wrongful death remedy limited to pecuniary loss, then Congress should make that choice.

Indeed, were Congress to enact legislation providing a remedy for wrongful death on territorial waters, this Court would assess its preemptive effect " 'start[ing] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In the event the statutory scheme contained an express preemption provision, the Court would "fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language" of the provision. *Id.* at 2621. And in assessing any claim of conflict or implied preemption, the Court would "never assume[] lightly that Congress has derogated state regulation, but instead . . . address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1676 (1995). In short, the reluctance to find preemption and the requirement that Congress provide clear and unambiguous evidence of such purpose is born out of respect for the principles of federalism and state sovereignty embodied

in the text and structure of the Constitution. *Cipollone*, 112 S.Ct. at 2625-26 (Blackmun, J., joined by Kennedy, J., and Souter, J., concurring in part, concurring in the judgment in part and dissenting in part); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-57 (1984) (Atomic Energy Act did not preempt state law punitive damages award).

The high degree of restraint exercised by the Court in statutory preemption cases is even more appropriate where, as here, the rule which assertedly preempts the States' police powers is not the product of legislative enactment but of judicial lawmaking. For when Congress acts, the States can use whatever political influence they have to limit the preemptive scope of a statute. And Congress, with its superior fact finding resources, is better suited to determine whether the federal interest in interstate uniformity requires the preemption of state laws.

III. THE *MORAGNE* REMEDY DOES NOT PREEMPT STATE WRONGFUL DEATH REMEDIES

Ignoring the role of the States in our federal system, petitioners and their *amici* view the judicially created *Moragne* remedy as a decisive broadside on the admiralty tradition of applying state wrongful death and survival remedies. *See* Pet. Br. 31. In their view, state law has no place in deciding the wrongful death claims for a nonseaman arising from a tort occurring within a State's territorial jurisdiction. *Id.* As explained below, assigning this broad preemptive force to *Moragne* finds no support in the analytical justification on which the decision rested and ignores the States' substantial interest in regulating tortious conduct occurring within their borders. *Moragne* can and should be read in a manner which accommodates the interests of both the States and the Federal Government.

In *Moragne*, the widow of a longshoreman brought a wrongful death suit against a vessel owner alleging separate counts of negligence and unseaworthiness of the

vessel. 398 U.S. at 376. The defendants in the suit, the vessel owners and the impleaded decedent's employer, moved to dismiss the unseaworthiness count on the ground that *The Harrisburg* barred relief under the general maritime law and that, under Florida's wrongful death statute, unseaworthiness was not a basis of liability. *Id.* The district court granted the motion and the court of appeals affirmed. *Id.* at 376-77.

This Court reversed, overruling *The Harrisburg*. In particular, the Court noted three anomalies which had arisen with the admiralty's recognition of the absolute and distinctly maritime duty to provide a seaworthy vessel (a duty which has never been extended to non-seamen/passengers). Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-5, at 134 (1987). By 1970, "[t]he unseaworthiness doctrine ha[d] become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act, and . . . ha[d] achieved equal importance for longshoremen and other harbor workers to whom the duty . . . was extended because they perform work on the vessel traditionally done by seamen." *Moragne*, 398 U.S. at 399 (citations omitted). The Court was thus properly concerned with the existing incongruities which prevented the full vindication of this uniquely federal duty and which, in some instances, denied those to whom the duty was owed a remedy for wrongful death.[10]

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[10] The Court set forth the three anomalies as follows: The first was that "within territorial waters, identical conduct violating federal law . . . produces liability if the victim is merely injured, but frequently not if he is killed." 398 U.S. at 395. The second was that "identical breaches of the duty to provide a seaworthy ship, resulting in death, produce liability outside the three mile limit [where the DOHSA applied] but not within the territorial waters of a State whose local statute excludes unseaworthiness claims." *Id.* (citation omitted). The third was that a seaman "covered by the Jones Act—is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended . . . does have such a remedy when allowed by a state statute." *Id.* at 395-96.

The *Moragne* Court made clear, however, that its purpose in creating a wrongful death remedy under the general maritime law was to effectuate this uniquely federal duty and not to otherwise preempt state wrongful death remedies. As the Court stated, "[o]ur recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to *exclusively maritime substantive concepts.*" 398 U.S. at 401 (emphasis added). The Court further observed:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness. Federal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law.

398 U.S. at 401 n.15 (citation omitted).[11]

As explained above, the uniquely federal maritime doctrine of unseaworthiness imposes a duty on a vessel owner vis-a-vis seamen and a limited class of maritime employees.[12] It provides no redress to persons such as the

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[11] It bears noting that in *Moragne*, the defendants did not challenge the plaintiff's right to pursue a wrongful death claim based on negligence because Florida's statute encompassed this duty. *See* 398 U.S. at 376.

[12] In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, 33 U.S.C. §§ 901-950, abrogating the right of covered employees to recover from vessel owners for injury and death under the unseaworthiness doctrine, thus rendering *Moragne* inapplicable on its facts. *See Miles*, 498 U.S. at 28.

decedent, a recreational user of watercraft, or for that matter, passengers and guests on either recreational or commercial vessels. It is thus implausible that in creating a remedy to vindicate a uniquely federal policy, the Court intended to preempt the application of state wrongful death statutes even where, as here, the underlying duties which have been breached—negligence, strict liability, and breach of implied warranties of merchantability and fitness for purpose in the design and sale of a product—are not exclusively federal. To do so is to ignore that "[t]he State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history" and that "allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy." *Romero*, 358 U.S. at 374-75; *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("[T]he states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.").

To be sure, admiralty courts have incorporated these duties into the general maritime law. *See, e.g., East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-66 (1986). But to decide that these duties are within the cognizance of admiralty is not to render them the subject of exclusive federal interest. To the extent that the breach of these duties violates state law and occurs within a State's territorial jurisdiction, the States retain a substantial interest in enforcing them. Consistent with the reasoning of *Moragne* itself, the Court should hold that the general maritime remedy for wrongful death provides a remedy for the breach of an exclusively federal duty but does not preempt a state remedy when the underlying duty is cognizable under state law.[13]

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[13] Petitioners cite *Miles* arguing that it "specifically concluded that '*Moragne* intended to create a general maritime wrongful death action applicable *beyond the situation of longshoremen.*'" Pet. Br. 22 (quoting 498 U.S. at 30) (emphasis added by petition-

IV. THE *MORAGNE* REMEDY SHOULD NOT BE EXTENDED TO PREEMPT STATE WRONGFUL DEATH REMEDIES

As explained above, *Moragne* and *Miles* were limited holdings recognizing a wrongful death remedy under the general maritime law in order to vindicate the uniquely federal duty of a vessel owner to provide seamen (and formerly longshoremen) with a seaworthy vessel. Moreover, the various policy arguments put forth by petitioners and their *amici* provide no justification for the Court to disregard the congressional judgment manifested in the DOHSA to preserve state wrongful death remedies for torts occurring in the territorial waters. They likewise fall far short of the threshold this Court has traditionally required for overruling its prior decisions, a relevant inquiry given the numeous cases such as *Sherlock* and *Steamboat Co. v. Chase* upholding the application of state wrongful death remedies to maritime torts. Aside from these considerations, the arguments are not persuasive in their own right.

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ers); *see also* Br. U.S. *Am. Cur.* 22. *Miles*, however, involved a seaman, a person to whom the uniquely maritime duty of seaworthiness is owed. *See Mahnich*, 321 U.S. at 103; *see also Miles*, 498 U.S. at 21-28. The situation was thus analogous to that in *Moragne* (notwithstanding that in 1972 Congress amended the LHWCA to bar longshoremen from suing vessel owners for unseaworthiness), in that with the evolution of the distinctly maritime duty of seaworthiness, federal law should provide the remedy for its breach. *See id.* at 21-30. *Miles* did not hold that the *Moragne* remedy was applicable to persons such as the decedent here and has preclusive effect. *See id.* at 37 ("We hold that there is a general maritime cause of action for the wrongful death of a seaman[.]").

Nor does *Miles'* holding barring the recovery of non-pecuniary damages under the *Moragne* action aid petitioners. As the Court recognized, it is not free to fashion federal maritime law as it pleases but must respect Congress' judgment. *See* 498 U.S. 32-33; 36-37. Because Congress expressly made the judgment to preserve state wrongful death remedies in the territorial seas, *see supra* pp. 14-19, and this case does not involve the uniquely maritime duty of seaworthiness, state remedies must be recognized in admiralty.

The United States, for example, asserts that applying state wrongful death remedies that provide "a more generous measure of damages than the federal remedy . . . would create at least three unjustifiable 'anomalies' . . . similar to those that *Moragne* sought to eliminate." Br. U.S. 17. According to the United States, these anomalies are that: (1) "identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured"; (2) "beneficiaries of persons killed in territorial waters would have access to supplemental state remedies but beneficiaries of persons killed in identical accidents on the high seas would not"; and (3) "beneficiaries of non-seamen would likewise in some cases be eligible for a broader range of remedies than beneficiaries of seamen." *Id.* This argument is meritless.

As for the latter two purported anomalies, the United States ignores that the less favorable treatment accorded DOHSA and Jones Act claimants were the choices Congress made in enacting these statutes. As explained above, in the case of the DOHSA, Congress both preserved and preempted state remedies depending upon the situs of the tort; in the case of the Jones Act, Congress preempted state remedies depending upon the status of the employee. *See supra* 14-19.

With respect to the more favorable treatment accorded the survivors of those killed in territorial waters vis-a-vis those killed on the high seas, the United States ignores that the DOHSA authorizes a greater recovery even on the high seas when the law of a foreign State permits it. *See* 46 App. U.S.C. § 764. As Section 4 provides, "[w]henever a right of action is granted by the law of any foreign State . . . such right may be maintained . . . without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding." *Id.* Under this section, admiralty courts have upheld awards for non-pecuniary damages including pain and suffering and mental distress

where permitted by foreign law notwithstanding the DOHSA's general prohibition of such recoveries. *See Noel v. Linea Aeropostol Venezolana*, 260 F. Supp. 1002, 1006 (S.D.N.Y. 1966). Given that Congress affirmatively sanctioned greater recoveries under foreign law notwithstanding the fortuity of such, it is entirely justifiable that the beneficiaries of those killed within a State's territorial jurisdiction recover the full measure of damages provided by its law.

With respect to the treatment accorded seamen and non-seamen, statutory law such as the Federal Employers Liability Act (which the Jones Act incorporates) and state workers' compensations statutes have long precluded employees from recovering from their employers the full scope of common law damages. Dan B. Dobbs, *Torts And Compensation* 742 (1985). Given that tort law has long provided different and less extensive remedies for injury occurring within the employment relationship than it does under the common law, it would be aberrant if the admiralty did not recognize a similar dichotomy. Moreover, while the United States professes solicitude for the welfare of seamen, its position would deny their survivors the full measure of damages in third party suits such as those that might be brought against the manufacturers of defective safety equipment.

No more persuasive is the United States' contention that state remedies should be preempted because "identical breaches of maritime duties would be subject to different measures of damages, solely because the victim of one breach was killed whereas the victim of another was injured."[14] Br. U.S. *Am. Cur.* at 17. This is largely a

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[14] The cases on which this argument is premised provide no support for the broad reading given them by the United States. Two involved personal injuries incurred by seamen, *see Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1922); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); others involved different liabilities of commercial shipping interests. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (action by guest of crew member against vessel owner); *Pope & Talbot,*

distinction without a difference because the maritime law generally authorizes the recovery of the types of damages traditionally available under state law such as those for pain and suffering, loss of society, and punitive damages. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4-12, at 142-43; § 4-14, at 145 (1987).

To the extent there is a substantive difference between the damages available under state and federal law, this incongruity can be as effectively cured by recognizing the authority of the States under the savings clause to set the measure of damages for those personal injury actions not resulting in death which occur within their waters and which are not otherwise subject to the Jones Act or LHWCA. *Cf. Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) (per curiam) (employee injured while working on barge in navigable waters could pursue state law negligence claim). This approach would be consistent with the expectations of recreational boaters, who register their vessels with their States, *see* 46 U.S.C. § 12301, are subject to extensive state boating safety regulation, *see* Appendix, and to prosecution under state law for criminal acts committed within territorial waters not-

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Inc. v. Hawn, 346 U.S. 406 (1953) (unseaworthiness claim by repair worker against vessel owners); *Workman v. City of New York*, 179 U.S. 552 (1900) (suit by owner of British barkentine for damages sustained in collision). These cases thus involved traditional concerns of admiralty law.

The remaining cases, which are products of the *Jensen* era, involved personal injuries incurred by shipyard workers while working on completed vessels. *See Messel v. Foundation Co.*, 274 U.S. 427 (1927); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). But as Gilmore and Black explain, the Court subsequently held that "repair work on a completed vessel was within the twilight zone [of overlapping state and LHWCA coverage], with the result that the state compensation commission was required to make an award in such a case if the injured worker elected to pursue his state remedy." Gilmore and Black, at 421. These cases thus do not support the United States' broad assertion that "the interest in maritime uniformity has long been held to preclude the application of state remedies" for tortious injuries which do not result in death. Br. U.S. *Am. Cur.* 15.

withstanding the maritime locus of the act. *See* Stolz, *Pleasure Boating and Admiralty*, 51 Cal. L. Rev. at 667 n.27; 18 U.S.C. § 7, § 13. If States are competent to define, prosecute and punish criminal homicides committed in territorial waters, they are no less competent to provide civil remedies for wrongful death.[15]

Indeed, far from curing unjustifiable anomalies, adopting petitioners' proposed regime would lead to a stream of perverse results. Products such as a jet ski are commonly used not only in territorial waters which are within the admiralty's jurisdiction but also in inland waters (such as lakes) which are indisputably not. Under petitioners' regime, the heirs of one killed by a defective product on the navigable waters (such as respondents) would be denied the same measure of recovery as the heirs of one killed on inland waters notwithstanding that both deaths were caused by the same tortious act. But if both incidents occurred within the same State's territorial jurisdiction, there is no justification for the disparate treatment. A notion as amorphous as the need for uniformity plainly does not justify this Court's creation of a common law rule which allows a tortfeasor to externalize the costs of its conduct solely because the injury occurred on the navigable waters. *Cf.* William M. Landes & Richard A. Posner, *The Economic Structure Of Tort Law* 186-87 (1987). And surely admiralty tort law is as concerned

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[15] Petitioners suggest the existence of another anomaly in asking "What was to happen when a death occurred in waters at the border of two states—only one of which offered a maritime death remedy?" Pet. Br. 19. Petitioners do not, however, point to a single case in which this happened. *See id.* Moreover, today every State has enacted a wrongful death statute governing most if not all breaches of tort duties, *see Moragne*, 398 U.S. at 390; to the extent that a State may not recognize the duty of seaworthiness, *Moragne* fills the void.

Petitioners' further question—"Was it fair, in a federal system of law, for two claimants to receive different compensation under circumstances indistinguishable apart from their state citizenship?" (Pet. Br. 19)—is answered by, *inter alia*, the savings to suitors clause which preserves the right of suitors to their state remedies.

as state tort law with creating the proper incentives for reducing accidents.

Beyond these perverse results, because of the reach of the admiralty jurisdiction adopting petitioners' rule will prompt much wasteful litigation over whether seemingly inland bodies of waters are within it.[16] For example, an admiralty court properly declined to exercise jurisdiction over a tort occurring on Skaneateles Lake, one of New York State's finger lakes. *See Reynolds v. Bradley*, 644 F. Supp. 42 (N.D.N.Y. 1986). Yet under the Court's precedents, torts occurring a short distance away on the Cayuga and Seneca Lakes are within the admiralty jurisdiction because these lakes are connected to the New York State Barge Canal System. *Cf. The Robert W. Parsons*, 191 U.S. 17 (1903); *Ex Parte Boyer*, 109 U.S. 629 (1884).[17] As long as the legal consequences are to

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[16] This Court has long held that the admiralty jurisdiction encompasses those inland waters which "form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). While the Court has required that inland waters be "navigable in fact," this standard is quite broad, encompassing waters not only "when they are used," but also when they are "susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* That a body of water has numerous obstructions such as falls and rapids which require portages does not bar the exercise of admiralty jurisdiction. *See The Montello*, 87 U.S. (20 Wall.) 430, 440-43 (1874); Schoenbaum § 3-3, at 67 n.24. Nor does it matter that the "commerce" conducted was the floating of rafts of bundled lumber. *See, e.g., The Montello*, 87 U.S. (20 Wall.) at 441. As *The Montello* noted, "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." 87 U.S. (20 Wall.) at 441. "[T]he liberal definition given to 'customary modes of trade and travel on water,'" *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563), suggests that numerous inland waters are within the admiralty jurisdiction.

[17] This example is by no means unique. There are numerous other inland lakes and waterways throughout the United States which are now subject to the admiralty jurisdiction. *See* Ralph

vary so significantly from admiralty to state jurisdiction, it is reasonable to expect that all courts, federal as well as state) will be inundated with litigation over such issues, an ironic result given that this Court most recently rejected a proposal to reformulate the admiralty jurisdiction test on the ground that it would "invit[e] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 115 S.Ct. 1043, 1055 (1995).

Ironically, petitioners' proposed regime undermines the uniform application of wrongful death remedies by creating not two, but three remedial schemes applicable to recreational users of the waterways: (1) the DOHSA for the high seas, (2) a common law federal maritime remedy for the navigable waters within a State (whose measure of damages will, as in the common law itself, be the subject of continued litigation) and (3) the State's remedy for all other waterborne deaths. Federal courts, of course, do not have the power to create a common law applicable to all torts. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, absent congressional preemption of state wrongful death remedies for inland tort claims, there is no possibility of ever having a uniform body of law governing Yamaha's conduct. The Court should therefore reaffirm the authority of the States to remedy all tortious waterborne deaths occurring within their jurisdiction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

McCaughan, *Federal Maritime Jurisdiction Over Inland Intrastate Lakes*, 26 Wash. & Lee L. Rev. 1 (1969).

Respectfully submitted,

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APPENDIX

SELECTED STATE RECREATIONAL BOATING SAFETY STATUTES

Ala. Code §§ 33-5-1—33-5-36; 33-5-50—33-5-81
Alaska Stat. Ann. §§ 05.25.010—05.25.100
Ariz. Rev. Stat. Ann. §§ 5-301—5-396.01
Ark. Code Ann. §§ 27-101-101—27-101-107; 27-101-201—27-101-205
Cal. Harb. & Nav. §§ 651—668.1
Colo. Rev. Stat. §§ 33-13-101—33-13-114
Conn. Gen. Stat. §§ 15-121—15-140u
Del. Code Ann. tit. 23, §§ 2111—2126; 2201—2225; 2301—2308
Fla. Stat. Ann. §§ 327.01—327.803
Ga. Code Ann. §§ 52-7-1—52-7-51
Haw. Rev. Stat. §§ 267-1—267-15
Idaho Code §§ 67-7001—67-7050
Ill. Ann. Stat. ch. 625, ¶¶ 45/1-1—45/1-5; 45/2-1—45/2-5; 45/3-1—45/3-14
Ind. Code §§ 14-1-1-1—14-1-1-63
Iowa Code §§ 462A.1—462A.85
Kan. Stat. Ann. §§ 32-1101—32-1180
Ky. Rev. Stat. Ann. §§ 235.010—235.330
La. Rev. Stat. Ann. §§ 34:851.1—34:851.30
Me. Rev. Stat. Ann. tit. 12, §§ 7791—7805
Md. Nat. Res. §§ 8-701—8-814
Mass. Ann. Laws ch. 90b, §§ 1—19
Mich. Comp. Laws §§ 281.1001—281.1190
Minn. Stat. §§ 86B.001—86B.815
Miss. Code Ann. §§ 59-21-1—59-21-153
Mo. Ann. Stat. §§ 306.090—306.225
Mont. Code Ann. §§ 23-2-501—23-2-536
Neb. Rev. Stat. §§ 37-1201—37-1274
Nev. Rev. Stat. §§ 488.015—488.290; 488.355—488.365
N.H. Rev. Stat. Ann. §§ 270:1—270:74-b; 270-D:1—270-D:9
N.J. Stat. Ann. §§ 12:7-23.1—12:7-69
N.M. Stat. Ann. §§ 66-12-1—66-12-23

N.Y. Nav. Law §§ 40—49-a; 71-c—79
N.C. Gen. Stat. §§ 75A-1—75A-19
N.D. Cent. Code §§ 20.1-13-01—20.1-13.1-14
Ohio Rev. Code Ann. §§ 1547.01—1547.69
Okla. Stat. tit. 63, §§ 801—825
Or. Rev. Stat. §§ 830.005—830.550
30 Pa. Cons. Stat. Ann. §§ 5101—5104; 5121—5126; 5501—5504; 58 Pa. Code §§ 91.1—109.6
R.I. Gen. Laws §§ 46-22-1—46-22-22; 46-22.2-1—46-22.2-8; 46-27-1—46-27-4
S.C. Code Ann. §§ 50-21-10—50-21-170; 50-21-810—50-21-860
S.D. Codified Laws Ann. §§ 42-8-1—42-8-102
Tenn. Code Ann. §§ 69-10-101—69-10-224
Tex. Parks & Wild. Code Ann. §§ 31.001—31.129
Utah Code Ann. §§ 73-18-1—73-18-23
Vt. Stat. Ann. tit. 23, §§ 3301—3318
Va. Code Ann. §§ 29.1-734—29.1-750
Wash. Rev. Code §§ 88.12.010—88.12.275
W. Va. Code §§ 20-7-1—20-7-23
Wis. Stat. §§ 30.50—30.70
Wyo. Stat. §§ 41-13-202—41-13-219